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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES D. BONANNO LINEN SERVICE, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSMEN AND HELPERS OF AMERICA, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE UNITED MINE WORKERS OF AMERICA, AMICUS CURIAE

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INTEREST OF AMICUS CURIAE*

The United Mine Workers of America ("UMWA") is an industrial union which represents coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA engages in collective bargaining with three multiemployer bargaining groups: the Bituminous Coal Operators Association, Inc., ("BCOA"), which

*All parties have consented by letter to the filing of this brief. These letters are on file with the clerk's office.

currently represents approximately 160 coal operators, including some of the largest coal companies in the United States; the Association of Bituminous Contractors, which represents over 300 construction companies, and the Anthracite Operators Wage Negotiating Committee which represents approximately 100 anthracite coal operators.

The employer in this case, Charles L. Bonanno, Linen Service, has petitioned this Court seeking reversal of the first circuit court's decision that impasse in negotiations does not justify an employer's withdrawal from a multiemployer unit. The UMWA views with grave concern any reversal of this decision. It believes that allowing an employer to withdraw from bargaining upon impasse, would severely weaken multiemployer bargaining.

Multiemployer bargaining, particularly in the coal industry, has had a positive, stabilizing influence and brought many benefits to the employees. Certainly the most far reaching of these benefits is the creation of multiemployer pension plans. It can not be disputed that without the multiemployer pension plans negotiated by the UMWA with the above mentioned bargaining units, many miners and construction workers would not be receiving a pension today or in the future. A multiemployer fund is essentially the only means of ensuring that an employee can continuously accumulate retirement benefits in the coal industry, where employees typically do not work continuously for one employer. Moreover, multiemployer funds have an added element of financial strength in that their contributions come from a number of employers who, as a group, are less likely than single employers to experience business difficulties. Additionally, it is likely that employers bargaining individually would resist negotiating a far reaching pension plan because of, among other things, the huge start-up costs.

To allow an Employer to withdraw from a multiemployer bargaining unit upon so usual and expected an occurrence as impasse, or a belief that impasse exists, would, the union submits, encourage the splintering of the bargaining unit and all the consequent problems which result. In the past, when the UMWA bargained on an individual and regional basis, employers vigorously resisted making agreements partially on the basis that in the highly competitive coal industry, an operator could not agree to be bound to a wage and benefit package without knowing what his competitors were going to do. The industrial instability which resulted from this type of bargaining is well documented in court decisions and history books.

SUMMARY OF ARGUMENT

The court below has properly held that an employer cannot withdraw from a multiemployer bargaining unit which it has freely joined, simply because an impasse has occurred. To hold otherwise, the union respectfully submits, would substantially weaken multiemployer bargaining by diluting the employer's commitment to the process. Without such a commitment, there is no longer the incentive for the employer to be part of the hard bargaining and necessary compromises which inevitably occur in multiemployer bargaining. Any weakening of multiemployer bargaining jeopardizes the benefits which have long been recognized to flow from this process, foremost of which, are numerous multiemployer pension plans.

ARGUMENT

Since December 10, 1980, when Bonanno petitioned for certiorari on the grounds that the court's decision below was contrary to five circuit courts' of appeal decisions, two of these circuits have changed their position,

citing with approval the decision below. In *NLRB* v. *Marine Machine Workers, Inc.*, 635 F.2d 522 (5th Cir. 1981) decided on January 30, the court stated that after negotiations have begun, the parties are required to honor their commitment to the process of multiemployer bargaining, which they freely elected. *Id.* An employer cannot use impasse as an excuse to breach this commitment. In *Tobey Fine Papers* v. *NLRB*, 107 L.R.R.M. 2221, 2222, n. 3 (8th Cir. 1981) decided April 20, while the Eighth Circuit did not face the issue directly, it stated that its decision in *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972) holding that an employer can withdraw from a multiemployer unit upon impasse, "can no longer be considered controlling in this circuit."[1]

I. WHEN AN EMPLOYER VOLUNTARILY BECOMES A PART OF A MULTIEMPLOYER BARGAINING UNIT IN ORDER TO ENJOY ITS MANY BENEFITS, THE EMPLOYER IMPLICITLY AGREES TO BE PART OF A BARGAINING PROCESS THAT IS NEVER EASY, RARELY SHORT AND OFTENTIMES INCLUDES IMPASSE.

As the Fifth Circuit recently held, it is entirely proper for the National Labor Relations Board ("NLRB") to require parties "after negotiations have begun . . . to honor their commitment to the process of multiemployer bargaining, which they freely elected." *NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522, 524 (5th Cir. 1981). The court further stated that a rule forbidding withdrawal upon impasse falls "well within the Board's broad discre-

[1] The court went on to hold that in this case the facts indicated that contrary to the employer's representations its withdrawal from the multiemployer bargaining unit was based on a belief that the union did not represent a majority of its employees and not on any belief as to the existence of an impasse.

tion to resolve the inevitable questions arising in the multiemployer bargaining context. See, *NLRB* v. *Truck Drivers Local Union No. 449* (Buffalo Linnen)," (citation omitted), *Id.* at 526.

This rule is based on the reality that there is nothing unusual or unforeseeable about an impasse in the context of collective bargaining. *Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980). As the NLRB has stated, "[t]he occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted . . . [w]ere we to hold otherwise, we would be denying the practical reality of collective bargaining negotiations." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), *decision overruled, NLRB* v. *Marine Machine Workers, Inc.*, 635 F.2d 522 (5th Cir. 1981), *enf'g*, 243 N.L.R.B. No. 119 (1979). Consequently when an Employer joins a multiemployer bargaining unit seeking its many advantages, it also should accept as part of the bargain, the fact that bargaining will not always be easy and may oftentimes include an impasse. Allowing employers to withdraw the bargaining authorization freely given, upon impasse, allows employers to "reap the benefits of group bargaining without incurring any of its responsibilities." Murphy, *Impasse and the Duty to Bargain In Good Faith*, 39 Univ. of Pitt. L. Rev. 1, 59 (1977). Conflicts in negotiations inevitably arise, which can be resolved through time, bargaining, economic pressure, more bargaining and compromise.

Certainly this process is well illustrated by the recent coal negotiations for a successor agreement to the Na-

tional Bituminous Coal Wage Contract of 1978 which expired March 27, 1981. Talks began in earnest in January 1981 after some preliminary negotiations in the fall of 1980. *Wall Street Journal,* September 16, 1980 at 14, col. 2. The coal negotiations were characterized by long bargaining sessions, proposals, counter proposals, bargaining recesses, a strike, a tentative agreement which was rejected by the membership, and more bargaining.[2]

As the bargaining continued and no agreement was reached, rumblings began among various companies to the effect that their multiemployer bargaining group, the BCOA was not adequately representing their interests. In April 1981, Emery Mining Corporation ("Emery"), a major coal producer, sought to withdraw from the multiemployer bargaining unit. *Wall Street Journal,* April 27, 1981 at 18, col. 1. The BCOA and the UMWA resisted these attempts. Emery alleged, among other things, that an impasse had occurred. The UMWA maintained that no impasse had occurred and in any event, a withdrawal based on impasse alone was an unfair labor practice under the Act. This issue was not litigated as BCOA reached an agreement with the UMWA, to which Emery subsequently agreed to be bound.

The union submits, however, that "absent some constraints on the parties' freedom to withdraw from a multiemployer unit during the course of negotiations," as the court below recognized, splintering of the unit would occur and "the utility of this bargaining process would be

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[2] *Wall Street Journal,* January 26, 1981 at 14, col. 3; March 18, 1981 at 6, col. 2; March 19, 1981 at 2, col. 3; March 24, 1981 at 3, col. 1; April 2, 1981 at 2, col. 3; April 10, 1981 at 11, col. 2; May 11, 1981 at 10, col. 2; May 14, 1981 at 24, col. 1; May 18, 1981 at 6, col. 1, May 19, 1981 at 5, col. 1; May 26, 1981 at 7, col. 1; June 1, 1981 at 2, col. 3.

substantially undermined." *NLRB* v. *Bonanno Linen Service, supra* at 28. Although no wholesale defections from BCOA occurred during coal negotiations, it was due in large part, the union believes, to the present NLRB rules prohibiting withdrawal except for the occurrence of unusual circumstances, of which, impasse is not one.

II. MULTIEMPLOYER BARGAINING ESSENTIAL TO THE STABILITY OF BARGAINING WITHIN THE COAL INDUSTRY, AND LONG SUPPORTED AND ENCOURAGED BY CONGRESS, THE COURTS, AND THE NLRB SHOULD NOT BE WEAKENED BY ALLOWING AN EMPLOYER TO WITHDRAW FROM THE UNIT UPON IMPASSE.

A. Advantages of Multiemployer Bargaining

As this court has stated, Congress views multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Union,* 353 U.S. 87, 96 (1957).

The benefits widely recognized to derive from multiemployer bargaining were summarized by the First Circuit below, *NLRB* v. *Charles Bonanno Linen Service, supra* at 28 (1st Cir. 1980). The court stated that "[m]ultiemployer bargaining offers advantages to both management and labor" by:

(1) Enabling smaller employers to bargain on an equal basis with a large union and avoid the competitive disadvantages resulting from nonuniform contractual terms.

(2) Encouraging both sides to adopt a flexible attitude during negotiations without fear that concessions will result in competitive disadvantage somewhere else.

(3) Enhancing the efficiency and effectiveness of the collective bargaining process by permitting

the union and employer to concentrate their bargaining resources on the negotiation of a single contract, and,

(4) Facilitating the development of industry-wide worker benefit programs that employers otherwise might be unable to provide.

In this regard, industry-wide benefits have been of particular value to employees in the coal industry. Without a multiemployer pension plan, most coal miners would not receive a pension. A multiemployer fund is essentially the only means of ensuring that an employee can continuously accumulate retirement benefits in the coal industry where employees typically do not work continuously for one employer. Moreover, multiemployer funds have an added element of financial strength in that their contributions come from a number of employers who, as a group, are less likely than single employers to experience business difficulties.[3]

The United Mine Workers of America has three multiemployer pension plans: the Anthracite Health and Welfare Fund covering anthracite coal miners; and the 1950 and 1974 Pension Trusts covering bituminous coal miners. The foregoing 1974 pension plan covers construction workers as well. Funding for these plans comes from royalties paid by employers who are signatories to

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[3] Congress supports and seeks to protect multiemployer pension plans. In enacting the *Multiemployer Pension Plan Amendments Act of 1980*, Pub. L. No. 96-364 codified, 29 USC §§ 1001, Congress specifically found that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans . . ." 29 USC § 1001(a)(3). Accordingly, Congress declared it to be the policy of the Act "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans. . . ." 29 USC § 1001(a)(4)(A).

the national Anthracite, Bituminous and Construction workers' contracts.

As of June 1978, the two largest of these pension trusts, the 1950 and 1974 plans had vested benefits of 2.1 and 2.2 billion dollars respectively. *United Mine Workers of America Health and Retirement Funds, Annual Report,* p. 22, 27 (1979). As the foregoing Annual Report properly points out, the payments of benefits from these funds are of course "dependent on the continuation of such Agreements [referred to above] or the periodic negotiation of new agreements." *Id.* It is this union's view that a reversal of the court's decision below would jeopardize these funds by making it easier for employers who contribute to these funds to withdraw from multiemployer bargaining units.

B. Multiemployer Bargaining Has Contributed To Industrial Stability In The Coal Industry

In the past, the prospect of weakening or discouraging multiemployer bargaining has been greeted with keen disfavor by Congress, in part because of the lessons learned from the coal industry. During congressional debates on an unsuccessful amendment to the Labor Management Relations Act to declare multiemployer bargaining illegal, several Congressmen exhorted their colleagues not to forget what such a law would mean to the coal industry. House debate, 80th Congress, First Session (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act,* 1947, (hereinafter "____ Leg. His. ____"):

> *Rep. Snyder.** * *I believe I am well within the facts when I state that to eliminate industrial-wide bargaining would largely throw the coal industry into chaos. Anyone who is familiar with the history of the coal industry knows that at one time negotiations

were based at the union level, later at the district level, and finally we had industrial-wide bargaining and industrial-wide bargaining has brought stability to that industry. 1 Leg. His. 718.

* * *

*Rep. Kelly.** * *I know something about what happened in years gone by when they did not have industry-wide bargaining in the coal industry . . . the southern operators . . . pa[id] a lower wage . . . until the industry-wide bargaining brought about a level that they both paid [the north and south]. So it helped the coal industry all over the country. 1 Leg. His. 764.

* * *

*Rep. Fulton.** * *[T]he southern operators wanted to pay the miners less. They were able to deal with local employees because the employees were not apprised of their rights of collective bargaining and they did not have the representation that was as experienced as they had in the northern fields. We paid a higher wage rate in the northern fields, and then it was always a fight. First there was the fight between the mine operators and the unions, and then the unions would join up with the mine operators in the North and fight the southern operators to get their wages higher. 1 Leg. His. 764.

And, New York Senator Robert F. Wagner stated in an article reprinted in the Congressional Record at the time that:

Cooperation between labor and management to promote industrial efficiency and employee security would be abruptly cut short by the incredible proposals to prohibit industry-wide bargaining.* * *It would bring back the cycle of wage and price cutting which was characteristic of the coal industry and other industries in the twenties and thirties, precisely because there was no Nation-wide organization and collective bargaining. 2 Leg. His. 936.

As the foregoing recognizes, centralized bargaining in the coal industry brought benefits to companies and employees alike. As Justice Goldberg observed in commenting on industry-wide coal negotiations, "[w]hile the negotiations have not always been easy and many difficult issues have arisen, the procedure for solving [collective bargaining problems] has gone from the earlier jungle-type economic warfare to the reasoned and rational process of the Conference table." *Local Union No. 189* v. *Jewel Tea Co., Inc.*, 381 U.S. 676, 731 (1965) (dissenting from *Pennington* v. *United Mine Workers of America*, 381 U.S. 657, 675 (1965).[4]

III. INDIVIDUAL EMPLOYERS COULD DISRUPT MULTIEMPLOYER BARGAINING BY THE VERY ACT OF LITIGATING THE QUESTION OF WHETHER IMPASSE HAS OCCURRED, EVEN THOUGH IMPASSE IS SUBSEQUENTLY FOUND NOT TO HAVE OCCURRED.

The union is always very concerned by a possible decision which raises the specter of increased litigation for unions and all the time, money and uncertainty such litigation entails. A rule allowing an employer to withdraw from a bargaining unit upon impasse presents just such a possibility, because impasse "is a concept not susceptible of precise definition" and a "temporary condition which is easily ended" by "nearly any occurrence suggestive of possible success in further negotiations." Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 Univ. of

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[4] For a more detailed discussion of the foregoing evolution of bargaining in the coal industry see the district court's decision in *Ramsey* v. *United Mine Workers of America*, 265 F.Supp. 388, 404-07 (D.C. Tenn. 1967), *aff'd* 416 F.2d 655 (6th Cir. 1969), *rev'd* 401 U.S. 302 (1971).

Pitt. L. Rev. 1, 2 (1977).[5] A multiemployer bargaining unit could be splintered, not by an actual impasse, but by an individual employer's mere contention that an impasse exists justifying its withdrawal. As the union attempts to keep the bargaining unit intact by filing unfair labor practice charges against the employer, the effectiveness of the bargaining unit, as a practical manner, is diminished. It may take two to three years to litigate unfair labor practice charges on this issue.

Even if the foregoing withdrawals and litigtion does not occur the possibility is always present for it to, which is just as bad. As a result the focus of bargaining shifts from a total commitment by the multiemployer bargaining unit to reaching an agreement with the union, to the realization that now there is a way out. As a consequence the bargaining process is further impaired and more impasses may occur than do presently. "[I]mpasse is

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[5] For example, impasse on a single issue generally does not suspend the obligation to bargain on other issues. *Chambers Mfg. Co.*, 124 N.L.R.B. 721 1959) *enf'd*, 278 F.2d 715 (5th Cir. 1960). Moreover, no real impasse can be reached where bad faith bargaining has taken place *Neon Sign Corp.*, 229 N.L.R.B. 861 (1977). Impasse can be easily broken by among other things one party changing its position. *Sharon Hats, Inc.*, 127 N.L.R.B. 947 (1960) *enf'd*, 289 F.2d 628 (5th Cir. 1961).

There is also a question as to whether the employer must demonstrate that impasse exists in fact, or merely that the employer had a good faith belief that it existed. In *Cheney California Lumber Co.* v. *NLRB*, 319 F.2d 375 (9th Cir. 1963), the court said the issue was, "did respondent have a reasonable cause to believe and did sincerely believe, that an impasse had been reached" and "not whether judged on basis of hindsight" an impasse had occurred. By contrast, the NLRB asks whether the Employer was "warranted in assuming further bargaining would be futile." *Alsey Refractories Co.*, 215 N.L.R.B. 785 (1974).

generally avoidable only through the willingness of the parties to compromise. Compromise will not be fostered to the extent that members of multiemployer bargaining associations see impasse as an event that will permit them to avoid or at least delay being bound by an unfavorable contract." Murphy, *Impasse and the Duty to Bargain in Good Faith,* at 58 and 59, *supra.*

CONCLUSION

This union has struggled since its inception to bring about widespread multiemployer bargaining in the coal industry. Its existence as discussed above, benefits workers, and employers alike. Multiemployer bargaining was not easy to obtain and certainly, it is not easy to maintain. Its continued existence is dependent upon a definite commitment from its participants. To allow, as petitioner advocates, an Employer to withdraw from the unit upon so usual an occurrence as impasse, means that the Employer does not need to commit itself to bargaining on a multiemployer basis. The union submits that continued viability of collective bargaining on a multiemployer basis, requires that withdrawal not be permitted based on impasse alone.

Respectfully submitted,

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